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No. 89-710

In The

# Supreme Court of the United States

October Term, 1989

ALASKA DIVERSIFIED CONTRACTORS, INC.
AND FISCHBACH & MOORE OF ALASKA, INC.
d/b/a ALASKA DIVERSIFIED-FISCHBACH,
A JOINT VENTURE OF ALASKA CORPORATIONS,

*Petitioners,*

v.

LOWER KUSKOKWIM SCHOOL DISTRICT,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Alaska**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Were petitioners denied due process of law when a state's appellate court, rather than the trial court, decided contracts between petitioners and respondent were integrated, where (1) the issue of integration is a question for the court rather than a jury, and petitioners were allowed to argue the issue of integration before the appellate court; (2) all of petitioners' evidence relevant to integration was admitted at trial; (3) petitioners had numerous opportunities to present additional evidence, if they had any, but did not; and (4) petitioners' decision not to address the issue of integration at the original trial was based upon its own misunderstanding of applicable law?

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*Petitioners,*

v.

LOWER KUSKOKWIM SCHOOL DISTRICT,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Alaska**

## RESPONDENT'S BRIEF IN OPPOSITION

The respondent Lower Kuskokwim School District respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Alaska Supreme Court's opinion in this case. That opinion is reported at 778 P.2d 581 (Alaska 1989).

## CONSTITUTIONAL PROVISION

Section 1 of the Fourteenth Amendment to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

### I. STATEMENT OF FACTS

The original action arose out of two competitively bid construction contracts entered in 1979 between respondent, the Lower Kuskokwim School District (the "School District") and petitioners, Alaska Diversified Contractors, Inc. and Fischbach & Moore of Alaska, Inc. ("ADF"). The contracts involved the construction of a number of secondary schools in rural Alaska. The contracts provided that "WORK SHALL BE COMPLETED August 31, 1980." On the second page of the contracts, immediately above the signatures, the following appeared:

> ALTERATIONS. The following changes were made in this contract before it was signed by the parties hereto:
>
> NONE.

The contracts required ADF to submit construction schedules showing how it intended to complete the schools on time. The contracts gave the School District the right to take steps to improve ADF's progress if necessary. In the event ADF failed to complete on time, the School District could terminate ADF's contracts and complete the schools itself, or allow ADF to continue work and hold it liable for liquidated damages.

As part of the bidding process, the School District held a meeting to discuss the project with interested contractors. One topic was the liquidated damages provision as it related to the contracts' completion date. The School District explained that the contracts had a two-phase liquidated damages provision. For the first 11 months after the stated completion date, the liquidated damages were low. This was to discourage contractors from allocating large sums for liquidated damages in their bids to cover potential delays. The liquidated damages increased dramatically for delays greater than 11 months. At no time did the School District represent or promise that the deadline itself would be extended, nor were bidders told that liquidated damages were the only penalty that would be enforced under the contracts.

Shortly after the School District awarded the projects to ADF, the parties held a preconstruction conference. The School District stressed the importance of submitting and working within the construction schedules. ADF represented it planned to complete on time.

In October 1979, the School District became concerned about ADF's progress. The School District wanted a more precise schedule from ADF showing how it

intended to complete its work by August 31, 1980. ADF responded: "[W]e're reorganizing and, you know, if you just stop worrying about beating us to death about the completion date that [sic] we'll get things organized and you're going to have your schools on time." (Tr. 2637-8.)

Throughout the winter and spring of 1979 and 1980, the School District expressed its concern about the projects' slow progress and insisted ADF do its utmost to complete the schools by the date specified in the contracts. ADF continued to represent that it would complete the schools by the fall of 1980. Nevertheless, the schools were not completed on time.

After completing construction, ADF sued the School District seeking damages as a result of the efforts to get ADF to finish the schools by the date specified in the contracts. ADF claimed it had an extra year to complete the schools by virtue of statements made at the prebid conference regarding low liquidated damages for the first 11 months after the deadline. According to ADF, the School District's attempt to enforce the contracts' completion date represented a "change in philosophy" from its prebid statements, and amounted to a constructive acceleration of the contracts, requiring double shifts and winter work not contemplated in ADF's bid.

## II. STATEMENT OF PROCEEDINGS

ADF filed its complaint on January 13, 1982, claiming damages for extra work, changed conditions and delays allegedly caused by the School District. On October 11, 1983, the complaint was amended to allege ADF's work

was disrupted by the School District's "change in philosophy" regarding the time for completion.

Prior to trial, the School District moved for summary judgment on ADF's claims, as those claims were based upon oral, prebid modifications or explanations of the written contract documents. Since the contracts were unambiguous with respect to the required completion date and with respect to the School District's remedies upon a breach by ADF, this presented the classic, textbook example of when the Alaska parol evidence rule should be applied:

> Thus, there is ample authority for the Court to rule that, as a matter of law, any AD-F claim based upon oral, prebid explanations or alteration of the written terms of the contract between the parties must be dismissed.

LKSD Reply Memorandum in Support of Motion for Partial Summary Judgment at 3. (RP 228.)

In response to the summary judgment motion, ADF argued the parol evidence rule no longer applied in Alaska, stating "[t]he Supreme Court of Alaska has renounced the narrow 'parol evidence rule' to allow consideration of 'extrinsic evidence.' " Memorandum Opposing Defendant's Motion for Partial Summary Judgment at pp. 9-10 (RP 165-166). The trial court accepted ADF's argument and denied the School District's motion for summary judgment.

As the following excerpt from the School District's trial brief expressly shows, the parol evidence rule was also an issue at trial:

> [T]he Alaska Supreme Court has on a number of occasions applied a traditional formulation of the parol evidence rule to bar evidence of all statements to vary the terms of the written contract between the parties. *Pt. Valdez Co. v. City of Valdez*. 437 P.2d 768 (Ak. 1968); *Kupka v. Morey*. 541 P.2d 740 (Ak. 1975). In the 1981 decision of *Johnson v. Curran*, 633 P.2d 994 (Ak. 1981), the court found no ambiguity in the written contract between a nightclub owner and a performing band regarding the length of the band's engagement. It therefore held testimony of an alleged oral agreement for early termination was properly ruled inadmissible. . . .
>
> In the recent decision of *Alaskan Northern Development, Inc. v. Alyeska Pipeline Serv. Co.*, 666 P.2d 33 (Ak. 1983), the court . . . again discussed the parol evidence rule with approval and affirmed its earlier decision in *Johnson v. Curran* . . . [T]he above authority is a sufficient basis for the court to apply the parol evidence rule and prohibit the introduction of any evidence of oral statements to vary the written terms of the agreement. . . .

LKSD Pretrial Memorandum at 19 (RP 427).

In response to the School District's brief, ADF again asserted the parol evidence rule no longer applied in Alaska. ADF argued the School District's objections "relied almost entirely on decisions which pre-date the departure from old parol evidence principles" by the Alaska Supreme Court.[1] Plaintiff's Trial Brief at 15 (RP 402).

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[1] In its petition, AD argues that at the trial level the School District assumed, along with ADF and the trial court, that the parol evidence rule was a "dead letter" in Alaska. The

(Continued on following page)

The case was tried before a jury between March 12 and April 19, 1984. The parol evidence was admitted. The School District's motion for a directed verdict was denied. The School District's requests for proper parol evidence instructions were denied. The trial court entered judgment against the School District upon the jury's verdict that the written contracts had been modified by ADF's parol evidence. The School District's post-trial motions were denied.

The School District appealed and designated the following points for review:

* * *

> 3. The trial court erred by refusing to grant LKSD's motion for summary judgment on the ground that, as a matter of law, prebid oral explanations of contract terms may not change the terms of a written contract subsequently entered between the parties.
>
> * * *
>
> 8. The trial court erred by admitting extrinsic evidence for the purpose of varying on the terms of the written agreement entered between the parties.

School District's Statement of Points on Appeal, July 27, 1984 (RP 687, 688). In a unanimous decision, the Alaska Supreme Court reversed the judgment and reaffirmed the

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authority cited for this assertion is a parenthetical comment inserted into the trial court's oral ruling on remand. As the excerpts from the briefs at the trial level indicate, ADF's assertion misrepresents the record.

numerous Alaskan cases applying the parol evidence rule:

> [S]ince ADF's evidence contradicts the written agreements, the parol evidence rule bars the court or the jury from using this evidence.
>
> Given our conclusion that the written agreements were the complete and final agreements and that these agreements required completion by August 31, it follows that the School District did not modify or breach the agreements by requesting compliance with the deadline. Hence, we do not need to reach the remaining issues raised by the School District. The judgment below is REVERSED and the case REMANDED for disposition consistent with this opinion.

*Lower Kuskokwim School District v. Alaska Diversified Contractors. Inc.*, 734 P.2d 62, 64 (Alaska 1987).

ADF petitioned for rehearing, not on the basis that it had been denied due process, but because the Alaska Supreme Court had (1) misconceived material facts as to whether the School District preserved its right to raise the parol evidence rule on appeal; (2) misconceived the proposition of law that the parol evidence rule can be waived despite its substantive character; (3) misapplied the controlling legal principle that contract integration is a fact to be found by the trial judge; (4) overlooked controlling legal principles permitting the jury to consider extrinsic evidence of the parties' mutual intent; and (5) misconceived the material question of contract ambiguity. ADF Petition for Rehearing, March 20, 1989, at pp. 1-4 (App. 1-8, infra). The petition for rehearing was denied.

On remand, ADF argued that the Alaska Supreme Court's opinion did not decide all of the issues in the case, and that there were alternative theories which would support judgment in its favor. ADF did not raise a due process issue. The trial court rejected ADF's arguments and entered judgment for the School District. ADF appealed.

On the second appeal, ADF argued the contract integration issue was a matter to be decided at the trial level and, for the first time, argued it was denied due process when the issue was decided on appeal. The Alaska Supreme Court rejected ADF's arguments and affirmed the judgment on remand. *Alaska Diversified Contractors, Inc. v. Lower Kuskokwim School District*, 778 P.2d 581 (Alaska 1989). The Alaska Supreme Court held ADF had not been precluded from introducing evidence on the integration issue and, in fact, ADF introduced all the evidence it had. Since integration was an issue for the court,[2] it was in as good a position as the trial court to decide the issue:

> [Integration] is a question which this court is as well situated to decide as the trial court. ADF's contention that by so ruling this court unconstitutionally deprived it of the opportunity to be heard as to the issue of integration lacks merit. *ADF presented its arguments to this court. The evidence which would prove or disprove*

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[2] *Alaska Diversified Contractors*, 778 P.2d at 583; *see Alaska Northern Development, Inc. v. Alyeska Pipeline Serv. Co.*, 666 P.2d 33, 37 (Alaska 1983), *cert. denied*, 464 U.S. 1041, 104 S. Ct. 706, 79 L. Ed. 2d 170 (1984); *Mitford v. de Lasala*, 666 P.2d 1000, 1004 (Alaska 1983); Restatement (Second) of Contracts § 209(2) and comment c.

> *integration was admitted at trial for the purpose of proving the existence of a prior inconsistent agreement.* The thrust of ADF's argument below was that the parties intended the prior agreement to survive the execution of the contract.

*Alaska Diversified Contractors*, 778 P.2d at 583-584 (emphasis added).[3] The Alaska court also noted that the "Instructions to Bidders" form supplied to ADF contained the functional equivalent of an integration clause,[4]

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[3] The court also referenced the Restatement (Second) of Contracts § 212, comment d:

> Likewise, since an appellate court is commonly in as good a position to decide such questions as the trial judge, they have been treated as questions of law for purposes of appellate review. Such treatment has the effect of limiting the power of the trier of fact to exercise a dispensing power in the guise of a finding of fact, and thus contributes to the stability and predictability of contractual relations.

[4] The form provided to ADF stated as follows:

> *Explanation to Bidders.* Any explanation desired by bidders regarding the meaning or interpretation of the drawings and specifications must be requested in writing and with sufficient time allowed for a reply to reach them before the submission of their bids. *Oral explanations or instructions given before the award of the contract will not be binding.* Any interpretation made will be in the form of an addendum to the specifications or drawings and will be furnished to all bidders and its receipt by the bidder shall be acknowledged.

*Alaska Diversified*, 778 P.2d at 585 (emphasis added by the court).

and this confirmed the correctness of its prior decision. *Alaska Diversified*, 778 P.2d at 585. The Alaska Supreme Court concluded that ADF's arguments "reveal[ed] a fundamental misunderstanding of the parol evidence rule" and were "particularly untenable" in light of *Alaska Northern Dev. Inc. v. Alyeska Pipeline Service Co.*, 666 P.2d 33, 37-40 (Alaska 1983) a case which had reaffirmed the role of the parol evidence rule in Alaska less than a year prior to the trial in the present case. *Alaska Diversified*, 778 P.2d at 584 and n.4.

ADF now petitions this Court for a writ of certiorari.

## SUMMARY OF ARGUMENT

Petitioners' due process arguments rest entirely upon the patently false allegation that the parol evidence rule was not an issue at the trial court level. In fact, the parol evidence rule was raised at summary judgment, in the parties' respective trial briefs, and during the objections to jury instructions. Petitioners have raised the alleged insufficiency of respondent's parol evidence objections on at least three different occasions before the Alaska Supreme Court, and on each occasion Petitioners' arguments have been rejected. For this Court to reach Petitioners' due process claim, it would first have to overrule the Alaska court's repeated holding that the parol evidence rule was an issue at the trial court level. This determination by the Alaska court, however, does not raise a federal question and is not subject to review by this Court.

Petitioners' arguments are also without merit since due process is not denied when an appellate court, rather than a trial court, decides a matter preliminary to the introduction of evidence at trial. Moreover, petitioners failed to argue the issue of integration at trial, not because the trial court precluded them from doing so, but because they made a strategic choice to rely on the argument that the parol evidence rule was a dead letter in Alaska. Petitioners were allowed to introduce evidence on every theory they chose to pursue. Their arguments on the issue of integration were presented to and considered by the Alaska Supreme Court. No issue under the Fourteenth Amendment has been presented. The petition should be denied.

## REASONS WHY THE PETITION SHOULD BE DENIED

ADF bases its petition on the due process clause of the United States Constitution, Section 1 of the Fourteenth Amendment, which provides:

> No state shall . . . deprive any person of life, liberty or property, without due process of law.

ADF has failed to raise a genuine issue under this clause. Since no important federal question has been presented, Rule 17.1(c), the petition for certiorari should be denied.

### I. ADF'S ARGUMENTS ARE PREMISED UPON RULINGS OF THE ALASKA SUPREME COURT WHICH DO NOT RAISE QUESTIONS OF FEDERAL LAW

The parol evidence rule states that the unambiguous terms of an integrated contract may not be varied by

evidence of prior representations or agreements. *See, e.g., Johnson v. Curran,* 633 P.2d 994, 995 n.1 (Alaska 1981). ADF argues that since the parol evidence rule was not an issue at trial, it had no reason and no opportunity to present evidence that the contracts were not integrated. According to ADF, it was denied due process when the contracts were determined to be integrated on appeal.

The premise of ADF's due process claim, that the parol evidence rule was not an issue at trial, rests upon its argument that the School District did not make evidentiary objections based upon the parol evidence rule and did not make proper objections to the trial court's instructions to the jury. ADF has presented this argument on at least three prior occasions – in ADF's brief on the initial appeal, in ADF's petition for rehearing and in ADF's briefs on the second appeal – and each time the argument has been rejected.

ADF forgets that the parol evidence rule is a rule of substantive law, not of evidence, and evidentiary objections are unnecessary to raise the issue of the rule's effect. *Lower Kuskokwim School District v. Alaska Diversified Contractors, Inc.,* 734 P.2d 62, 64 n.1 (Alaska 1987). ADF ignores that the parol evidence rule was raised at summary judgment and in the parties' respective trial briefs. ADF also ignores the presumption that contracts are integrated, and that it, not the School District, had the burden of asserting non-integration as an affirmative defense. With regard to the trial court's instructions, the Alaska Supreme Court expressly found:

> The School District preserved its right to raise the parol evidence rule as a point on appeal by requesting instructions as to the effect of the

> rule, and by objecting to the court's failure to give parol evidence rule instructions.

*Lower Kuskokwim*, 734 P.2d at 64, n.1.

Since the issue of whether the parol evidence rule had been raised at trial does not present a federal question, ADF may not request this Court to redecide it.

## II. DUE PROCESS IS NOT DENIED WHEN AN APPELLATE COURT, RATHER THAN A TRIAL COURT, DECIDES A MATTER PRELIMINARY TO THE INTRODUCTION OF EVIDENCE IN A CIVIL CASE

ADF argues it was denied due process when the Alaska Supreme Court decided, in the first instance, the factual issue of integration. ADF apparently believes there is some right inherent in the Fourteenth Amendment to have certain issues in a civil case heard at the trial level. This Court rejected a similar argument in *Time, Inc. v. Firestone*, 424 U.S. 448, 47 L. Ed. 2d 154, 96 S. Ct. 958 (1976):

> Nothing in the Constitution requires that assessment of fault in a civil case tried in a state court be made by a jury, nor is there any prohibition against such a finding being made in the first instance by an appellate, rather than a trial, court. The First and Fourteenth Amendments do not impose upon the States any limitations as to how, within their own judicial systems, fact-finding tasks shall be allocated.

424 U.S. at 461, 47 L. Ed. 2d at 167.

In Alaska, as with the majority of jurisdictions, integration is an issue decided by the court rather than a jury.

*Lower Kuskokwim*, 734 P.2d at 64; Restatement (Second) of Contracts §209(2) and comment c. ADF presented its arguments regarding integration to the Alaska Supreme Court. All of the evidence relevant and necessary to decide the issue was already included in the record on appeal. *Lower Kuskokwim*, 734 P.2d at 64. If ADF had additional evidence, it could have presented it on the initial appeal, in its petition for rehearing, in its briefs on remand or in its briefs on the second appeal. This it did not do. The Alaska Supreme Court's decision to address the issue of integration in the first instance did not violate the Fourteenth Amendment and does not raise a federal question. ADF's petition should be denied.

## III. ADF WAS NOT DENIED AN OPPORTUNITY TO PRESENT ITS EVIDENCE

ADF cites *Saunders v. Shaw*, 244 U.S. 317, 37 S. Ct. 638, 61 L. Ed. 1163 (1917), to support its argument that it was unconstitutionally denied an opportunity to present evidence of integration. In *Saunders*, the state court refused to hear evidence that the plaintiff did not benefit from a particular tax, ruling it was immaterial. The defendant therefore presented no evidence showing the plaintiff had in fact benefitted. On rehearing, the court reversed itself and, relying on the plaintiff's proffered evidence, entered judgment for the plaintiff without giving the defendant an opportunity to be heard. This Court held the defendant was denied due process. 244 U.S. at 319.

Unlike the situation in *Saunders*, the trial court in the instant case did not rule that integration was immaterial, and did not preclude ADF from introducing evidence on

the issue. ADF was not denied an opportunity to be heard. ADF could have argued that the contracts were not integrated, but instead chose to rely upon the proposition that the parol evidence rule no longer existed. As noted by the Alaska Supreme Court, *Lower Kuskokwim*, 734 P.2d at 64, all ADF's evidence relevant to the issue of integration came in to prove ADF's assertions regarding the existence of a prior agreement. ADF also had the opportunity to present any additional evidence it may have had on both appeals, on remand after the initial appeal, and on its petition for rehearing, but ADF either had no such evidence or simply chose not to present it. ADF actually argued the issue of integration before the Alaska Supreme Court. Thus, *Saunders* is inapposite.

A more closely analogous case is *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590, *reh'g denied*, 419 U.S. 885, 95 S. Ct. 157, 42 L. Ed. 2d 129 (1974). At trial, the jurors in a criminal obscenity case had been instructed to apply "contemporary standards of the community as a whole." The petitioners interpreted this language to mean evidence of national standards of obscenity and, as a result, did not present evidence of local standards. On appeal, this Court held the relevant criminal statute required a local standard of obscenity. Since the lower court had not prohibited the presentation of local standards, however, there was no denial of due process. The petitioner's failure to present evidence on this factual issue was due to its own misunderstanding of applicable law. 418 U.S. at 110 n. 11, 94 S. Ct. 2904 n.11.

Likewise, if ADF failed to present evidence on the issue of integration, it was not because the trial court

precluded it from doing so, but because it made a conscious decision to rely on its argument that Alaska no longer followed the parol evidence rule. Since ADF was not denied the opportunity to present evidence, there has been no due process violation.

ADF also suggests that a court's decision to alter the existing common law may violate the Fourteenth Amendment. Even if this proposition were correct, it would not apply here. The Alaska Supreme Court's decision simply reaffirmed a line of Alaska cases applying the parole evidence rule. There was no change whatsoever in settled Alaska law. *See, e.g., Alaska Northern Development, Inc. v. Alyeska Pipeline Service Co.*, 666 P.2d 33, 37-40 (Alaska 1983), *cert. denied*, 464 U.S. 1041, 104 S. Ct. 706, 79 L. Ed. 2d 170 (1984); *Johnson v. Curran*, 633 P.2d 994, 995 n.1 (Alaska 1981); *Kupka v. Morey*, 541 P.2d 740, 747-48 n.9 (Alaska 1975). ADF's arguments that the parol evidence rule was a dead letter revealed a "fundamental misunderstanding" of that rule. *Alaska Diversified*, 778 P.2d at 583-584 and n.5.

Nevertheless, even if a change in law occurred, a violation of the Fourteenth Amendment may not be premised upon such a change. Justice Holmes, in delivering the opinion of the court in *Patterson v. Colorado*, 205 U.S. 454, 27 S. Ct. 556, 51 L. Ed. 879 (1907), stated:

> There is no constitutional right to have all general propositions of law once adopted remain unchanged. Even if it be true, as the plaintiff in error says, that the Supreme Court of Colorado departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the

> United States is not infringed. . . .[T]he decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because it is wrong or because earlier decisions are reversed.

205 U.S. at 461. This rule has been adhered to repeatedly. *See, e.g., Title Oil Co. v. Flanagan*, 263 U.S. 444, 450, 44 S. Ct. 197, 198, 68 L. Ed. 382 (1924); *Dunbar v. City of New York*, 251 U.S. 516, 519, 40 S. Ct. 250, 64 L. Ed. 384 (1920).

ADF's reliance upon *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S. Ct. 451, 74 L. Ed. 1107 (1930), is misplaced. Under the peculiar facts of that case, a change in settled law resulted in one party being denied an opportunity to be heard in any forum. That is not the case here, as ADF had more than adequate opportunity to present whatever arguments or evidence it may have had on the issue of contract integration.

*Brinkerhoff-Faris*, and the other cases cited by ADF[5] are also inapposite as those cases involved established property rights. It is difficult to ascertain what property right ADF claims has been invaded here. As this court held in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), the range of

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[5] *Sotomura v. County of Hawaii*, 402 F. Supp. 95 (D. Hawaii 1975); *Sotomura v. County of Hawaii*, 460 F. Supp. 473 (D. Hawaii 1978); *Robinson v. Ariyoshi*, 441 F. Supp. 559 (D. Hawaii 1977), *affirmed in part, vacated in part*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902, 106 S. Ct. 3269, 91 L. Ed. 2d 560 (1986). These cases have been subject to criticism. *See Corporation of the Presiding Bishop v. Hodel*, 637 F. Supp. 1398, 1407 and n.5 (D.D.C. 1986).

interests protected by procedural due process is not infinite:

> The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. . . .
>
> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

408 U.S. at 576-77.

There is no property interest inherent in the application of the rules of contract interpretation. There is no property interest in having a trial court, rather than an appellate court, decide an issue which is a question for the court. There is no property interest in a judgment which is premised on inadmissible evidence and an erroneous legal theory. Since ADF was afforded a trial under every theory of recovery it chose to present, it has no viable due process claim.

## CONCLUSION

There is no denial of due process when a jury verdict, which has been rendered on incompetent and inadmissible evidence, is overturned. Likewise, due process is not denied when an appellate court, rather than the trial court, decides a matter preliminary to the introduction of evidence, such as whether a written contract contains a complete statement of the parties' agreement. ADF was not precluded from introducing evidence by the trial

court. Instead ADF chose to rely on an erroneous legal theory. In fact, ADF introduced all the evidence it had. The petition has not raised a federal question and should be denied.

Respectfully submitted,

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THE SUPREME COURT OF THE STATE OF ALASKA

| | | |
|---|---|---|
| LOWER KUSKOKWIM SCHOOL DISTRICT, | ) | |
| Apellant, | ) | FILE NO. S-587 |
| v. | ) | |
| ALASKA DIVERSIFIED CONTRACTORS, INC., and FISCHBACH & MOORE OF ALASKA, d/b/a ALASKA DIVERSIFIED-FISCHBACH, a joint venture of Alaska corporations, | ) | |
| Appellees. | ) | |

*PETITION FOR REHEARING*

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Alaska Diversified-Fishbach petitions for rehearing of this matter decided by Opinion 3165, dated March 13, 1987. Under the standards enumerated in Appellate Rule 506(a), rehearing should be ordered upon the grounds set forth below.

## *THE COURT HAS MISCONCEIVED MATERIAL FACTS AS TO WHETHER LKSD PRESERVED ITS RIGHT TO RAISE THE PAROL EVIDENCE RULE OF APPEAL*

The Court's holding as to application of the parol evidence rule is founded upon the factual predicate stated in footnote 1 on page 3:

> . . . The school district preserved its right to raise the parol evidence rule as a point on appeal by requesting instructions as to the effect of the rule, and by objecting to the court's failure to give parol evidence rule instructions.

The court has apparently relied upon erroneous statements in LKSD's Brief (p. 41, n.9).

In fact, LKSD neither requested an instruction barring parol evidence, nor objected to any failure to give such an instruction. LKSD *withdrew* (by substitution) its initially proposed Instruction No. 29 (CP 342-43, attached as Appendix-1), which would have instructed the jury to "first look solely to the written contract." No objection was made to the fact that Instruction No. 29 was not given. (The complete record of LKSD's jury instruction objections is attached as Appendix-2, Tr. 3938-3947.)

The instruction finally proposed by LKSD (proposed Instruction No. 30, CP 344-45, Appendix-3), would have invited the jury to consider evidence of "the surrounding circumstances of the contract's formation and performance." That instruction did not prohibit consideration of extrinsic evidence, and it did not address the issue of integration (on which this Court now relies). LKSD's objection (Tr. 3941, line 20, to 3943, line 2) was limited to the failure to give its proposed Instruction No. 30. LKSD's

counsel did not refer to either parol evidence or integration in objecting. Consequently, LKSD did *not* request an instruction as to the effect of the parol evidence rule. And LKSD did *not*, in fact, "object" to the court's failure to give a parol evidence rule instruction.

It is also significant that LKSD offered no objection to the giving of Instruction No. 18 (CP 598). That instruction advised the jury that contracts "may include terms different from or in addition to those contained in the contract documents."

## *THE COURT HAS MISCONCEIVED THE PROPOSITION OF LAW THAT THE PAROL EVIDENCE RULE CAN BE WAIVED DESPITE ITS SUBSTANTIVE CHARACTER*

In its Opinion, the Court rules that LKSD preserved parol evidence defenses despite failing to make evidentiary objections to the parol evidence at trial (p. 3, n. 1). The Court indicates that no objection was necessary because "the parol evidence rule is a rule of substantive law."

However, "[r]ecent appellate opinions have recognized that the benefits of the parol evidence rule can be waived, despite the substantive character of the rule. [Citing cases.]" *Cedic Dev. Corp. v. Sibole*, 541 P.2d 1169, 1171 (Ariz. App. 1975); *see also New Orleans Saints v. Griesedieck*, 790 F.2d 1249, 1252 n.2 (5th Cir. 1986); *Vallarta v. Lee Optical*, 298 N.E.2d 212, 215 (Ill. App. 1973) ("defendant did not object to this testimony at trial and has accordingly waived its right to assert the parol evidence rule on appeal"); *Okuhara v. Broida*, 456 P.2d 228, 231 (Hawaii 1969). This is consistent with "the general rule

that a party may not raise for the first time on appeal an alleged error to which he failed to object in the trial court." *Chugach Elec. Ass'n. v. Lewis*, 453 P.2d 345, 349 (Alaska 1969). Under these principles, LKSD waived any parol evidence defense by failing to make evidentiary objections to the parol evidence at trial, failing to propose a parol evidence rule instruction, failing to request a finding of contract integration, and agreeing to Instruction 18.

## *THE COURT HAS MISAPPLIED THE CONTROLLING LEGAL PRINCIPLE THAT CONTRACT INTEGRATION IS A FACT TO BE FOUND BY THE TRIAL JUDGE*

The Court's Opinion (pp. 3-4) notes that the trial judge made no finding on contract integration (because LKSD requested none). The Court then makes its own finding of integration based solely on examination of the parties' written contract. Those documents do not include an integration clause reciting that they contain the parties' complete agreement. Nevertheless the Court infers that integration must have been intended because the written terms are lengthy and detailed. The Court states that finding on integration is a question "for the court." However, under controlling precedent set forth below, contract integration is a question of *fact* for the *trial* court.

It is respectfully submitted that the authorities cited in this Court's Opinion do not support the proposition that the factual finding of integration can be made for the first time on appeal. The *Restatement (Second) of Contracts* § 209 states that "[o]rdinarily the issue whether there is an integrated agreement is determined by the trial judge

in the first instance." *Id.* at p. 116. The cited case of *Alaska Northern Dev., Inc. v. Alyeska Pipeline Service Co.*, 666 P.2d 33, 37 (Alaska 1983) states that "[w]hether a writing is integrated is a question of fact to be determined by the court in accordance with all relevant evidence." That case applies the "clearly erroneous " standard to the integration question – further illustrating the factual nature of an integration finding. In *Mitford v. LaSala*, 666 P.2d 1000, 1004 (Alaska 1983), which is also cited by the Opinion, it is established that "[t]he court may resort to extrinsic evidence in determining whether an agreement is integrated."

Evidence from *both* AD-F and LKSD's own contract manager (Mr. Chauvin) established that both parties understood that their agreement to provide for nominal liquidated damages as the sole penalty for the first 11 months of "delay" past the stated completion date (*see* citations to record in AD-F's brief, at pp. 2-7). Special Verdict No. 1 (CP 630) confirmed that this understanding became part of the agreement. Given the ample evidentiary support for this verdict, the appellate court may not properly substitute a contrary finding (especially where an inference of intended integration is based solely on inspection of the written agreements).

Corbin says flatly that such issues as contract integration cannot "be determined by mere inspection of the written document." *Corbin on Contracts*, § 574, at pp. 359-60; *see also Id.*, § 582 at p. 451. In our case, the question of contract integration would necessarily have to weigh live testimony that was offered to explain the circumstances under which AD-F's contracts were entered. The Alaska Supreme Court has previously

refused to make its own fact findings in such matters. *See, e.g., Penn v. Ivey*, 615 P.2d 1, 3 (Alaska 1980) (credibility of witnesses and conflicting evidence must be weighed by trial court); *Patrick v. Sedwick*, 413 P.2d 169, 174 (Alaska 1966) (appellate court will not "make new independent findings upon evidence which we did not hear").

The finding of integration made for the first time on appeal by this Court would be particularly inappropriate here since neither the parties, nor the trial court, considered integration to be material at trial. As a result, the record on appeal is not fully developed on the question of integration. If it was error not to make a finding on integration, AD-F submits that the proper remedy would be a remand to the trail judge for a finding of fact. Applicable precedents preclude such a finding by the appellate court (at least where, as here, integration is contested).

## *THE COURT HAS OVERLOOKED CONTROLLING LEGAL PRINCIPLES PERMITTING THE JURY TO CONSIDER EXTRINSIC EVIDENCE OF THE PARTIES' MUTUAL INTENT*

In finding that AD-F's contracts were integrated, the Court effectively concludes that the jury's deliberations should have been limited to a review of the written contracts. This ruling contradicts the line of recent Alaska decisions that have admitted extrinsic evidence to ascertain the contract parties' mutual intent, regardless of whether the contract at issue was integrated.

The Alaska Supreme Court has held that "a court may initially turn to extrinsic evidence in construing a contract." *Dahl v. Griffin*, 652 P.2d 84, 87 (Alaska 1982);

*Alyeska Pipeline Service Co. v. O'Kelley*, 645 P.2d 767, 771 n.1 (Alaska 1982). "[E]xtrinsic evidence regarding the intent of the parties may be used to interpret a contract regardless of whether the contract appears to be ambiguous on its face or not." *Wright v. Vickaryous*, 598 P.2d 490, 497 n.22 (Alaska 1979); *see also Peterson v. Wirum*, 625 P.2d 866, 871 (Alaska 1981). The Court has said that extrinsic evidence is admitted because "the primary underlying purpose of the law of contracts is the attempted realization of reasonable expectations that have been induced by the making of a promise." *Stenehjem v. Kyn Jin Cjo*, 631 P.2d 482, 484-85 (Alaska 1981).

Even LKSD's own proposed Instruction No. 30 (CP 334-345) would have advised the jury to "give effect to the reasonable intentions of the parties," to be determined after considering extrinsic evidence. It would have permitted consideration of LKSD's contract manager's testimony that he induced contractors to bid subject to an agreement (reflected in supplementary general provisions) that construction could continue for up to 11 months with no penalty other than nominal liquidated damages (*see* record citations in AD-F's brief, pp. 2-7).

Several other recent cases have admitted extrinsic evidence as a basis for ascertaining the mutual intent of contracting parties. *See, e.g., Fairbanks v. Tundra Tours, Inc.*, 719 P.2d 1020, 1024 (Alaska 1986); *Norton v. Herron*, 677 P.2d 877, 880 (Alaska 1984); *Craig Taylor Equip v. Pettibone Corp.*, 659 P.2d 594, 597 (Alaska 1983); *Salmine v. Knagin*, 645 P.2d 148, 150 (Alaska 1982). Such evidence in this case established that both contract parties shared a common understanding about the consequences of completion after August 31, 1980. And as Corbin says: "There is no

sound reason for holding that parties are bound by any contract, *integrated or not*, in accordance with a meaning which the court now finds as a fact that neither of them gave to it." *Corbin on Contracts*, § 539 at p. 80 (emphasis added).

## *THE COURT HAS MISCONCEIVED THE MATERIAL QUESTION OF CONTRACT AMBIGUITY*

The Court's Opinion (at p. 2) rests on the premise that "the central dispute was over when completion was required." The Court has apparently assumed that AD-F was attempting to "negate" or "vary" from the contract completion date of August 31, 1980. This misconceives the nature of AD-F's argument and the basis for its jury verdict. Extrinsic evidence was necessary to resolve contract ambiguity regarding penalties for late completion – it was not offered to vary the contract completion date.

The completion date of August 31, 1980 was undisputed. At issue was the question of penalties if construction was delayed beyond that date. The boilerplate "general provisions" referred to termination for untimely completion, but a "supplementary general provision" set forth an 11-month grace period during which AD-F's only penalty would be payment of nominal liquidated damages (*see* citations to record in AD-F's brief, at pp. 4-5). Consistent with industry practice, these supplemental terms were intended and understood as modifying any inconsistent terms in the preprinted "general conditions" (Tr. 369, line 13, to 370, line 11). At the pre-bid conference, LKSD's contract manager told contractors that the boilerplate termination "could not have been invoked until after the July 31st, 1981 date" (Tr. 391, line

24, to 392, line 7). The 1980 completion date (for political reasons) would remain unchanged, but the penalty for delays up to 11 months would be confined to nominal liquidated damages.

Testimony of LKSD's statements to bidders was admissible to explain and resolve ambiguities in the written documents, which were drafted by LKSD and subject to interpretation under the rule of *contra proferentem*. *See* AD-F's Brief, at pp. 48-49. Even under the case cited in the Court's Opinion, "extrinsic evidence is admissible to interpret ambiguous or uncertain terms in a contract". *Johnson v. Curran*, 633 P.2d 994, 995 n.1 (1981). And "where interpretation of a written instrument turns on the acceptance of extrinsic evidence, the process of weighing such evidence should be for the trier of fact." *Alyeska Pipeline Service Co., supra*, 645 P.2d at 771 n.2. Thus, the controlling precedents establish that such evidence was properly admitted on the question of ambiguity (not to vary the contract completion date) regardless of whether the contract was integrated.

## *CONCLUSION*

As reflected in its brief, LKSD asked only for a new trial, hoping to exclude factual evidence of its representations to bidders. AD-F requests that the Court vacate its Opinion No. 3165, consider the remaining issues on appeal, and affirm the trial court judgment. Alternatively, AD-F requests a remand for additional findings by the trial judge, as set forth above.

DATED this 20th day of March, 1987.

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